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Supreme Court of the United States

OCTOBER TERM, 1950

No. 369

O. G. CARROLL and ANGELA J. CARROLL, husband and wife,

Petitioners.

vs.

LAURETTA KELLY, as administratrix of the estate of Morris C. Kelly, deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE PETITIONERS

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INDEX

Opinion Below 5
Jurisdiction 6
Questions Presented 9
Statute Involved 6
Statement 11
Summary of Argument 13
Argument 14
Conclusion 23

CITATIONS

CASES

Ashcraft v. Tennessee, 322 U. S. 143 ..... 9, 22

Brooks v. Herd, 144 Wash. 173,
257 P. 238 ..... 7, 12, 15, 18, 20

Fritz v. Horsfall, 24 Wn. (2d) 14,
163 P. (2d) 148 ..... 8, 12, 19

Huddleson v. Dwyer, 322 U. S. 232 ..... 9, 22

Kelly, Adx. v. Carroll,
136 Wash. Dec. 445, 219 P. (2d) 79 5

Patterson v. Alabama, 294 U. S. 600 ..... 9, 22

State Tax Commission v. Van Cott,
306 U. S. 511 ..... 9, 22

Wash. ex rel Oregon R. & N. Co.,
224 U. S. 510 21

CONSTITUTION OF UNITED STATES,

Amendment XIV 8, 10, 12, 14, 23

UNITED STATES STATUTES,

Title 28, U.S.C. 1257(3) 6

MISCELLANEOUS, TEXT,

12 Am. Jur. 309 (Const. Law #616) 21

54 Am. Jur. 898 (U. S. Courts #261) 21

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OPINION BELOW

The opinion of the Supreme Court of the State of Washington (R. 14-31) is reported in 136 Wash. Dec. 445, 219 P. (2d) 79, and the decision and order denying petitioners' Petition for Re-Hearing (R. 32-77) is reported in 136 Wash. Dec. 791.

JURISDICTION

The judgment and decision of the Supreme Court of the State of Washington (R. 14-31) was rendered and filed May 31st, 1950, and within the time prescribed by RULE 22 of the Rules of the Supreme Court of Washington, (Appendix to Petition ....-....) petitioners served and filed their Petition for Re-Hearing (R. 32-78), which under the rule suspended the decision until the decision on the Petition for Re-Hearing. On July 19th, 1950, the Supreme Court of Washington rendered and filed its Order Denying Petition for Re-Hearing (R. 79). October 16th, 1950, within ninety days after the final determination of said Supreme Court of Washington, petitioners filed their Petition for Writ of Certiorari and the record in said cause in this court.

Petitioners contend that this court has jurisdiction to issue the writ prayed for under the provisions of 28 U.S.C. 1257(3) in that by the decision of the Supreme Court of Washington (R. 14-31) and the rendering and entering of its Order Denying Petition for Re-Hearing (R. 79) the petitioners have been denied rights guaranteed them under Amendment XIV of the Constitution of the United States, in that:

1. The decision deprives petitioners of their right

of property and liberty in the pursuit of their profession without due process of law.

2. It abridges the privileges of petitioners and is discriminatory.

3. It denies to petitioners the equal protection of the law.

The federal question involved had its inception and was created by the wholly unanticipated and unexpected decision of the Supreme Court of Washington filed May 31, 1950 (R. 14-31) overruling long established rules and principles governing practice and procedure applicable to trials in malpractice cases, as applied to drugless physicians and sanipractors and their patients. It was presented to the Supreme Court of Washington by the Appellants' Petition for Re-Hearing (R. 32-77) and decided adversely to petitioners by the order of said supreme court denying said petition (R. 79).

The rules and principles governing practice and procedure applicable to trials in malpractice cases as applied to drugless physicians and sanipractors and their patients were laid down by the Supreme Court of Washington in the case of *Brooks v. Herd,* 144 Wash. 173, 257 Pac. 238, holding in part:

"The principles of law governing the relations

> of regular physicians and surgeons and their patients govern as to drugless healers and their patients."

In the later case of *Fritz v. Horsfall,* 24 Wn. (2d) 14, 163 P. (2d) 148, the Supreme Court of Washington laid down definite and certain rules and principles governing the relations of regular physicians and surgeons and their patients. By its decision in this case, in which petitioners were appellants and the respondent herein was respondent, (R. 14-31) the Washington Supreme Court diametrically reversed the rules and principles governing the relations of drugless physicians and sanipractors and their patients, under which the case had been tried, and established new and different rules and principles governing the practice and procedure in such cases, and by denial of petitioners' Petition for Re-Hearing deprived petitioners of the rights guaranteed them under Amendment XIV of the Federal Constitution of a fair and impartial trial, and of due process and equal protection of the law.

This court has on numerous occasions declared that "in determining what justice does require, the court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."

Ashcraft v. Tennessee, 322 U. S. 143; 88 L. Ed. 1192; 64 S. Ct. 921; citing:

Patterson v. Alabama, 294 U. S. 600, 79 L. Ed. 1082, 55 S. Ct. 575;

State Tax Commission v. Van Cott, 306 U. S. 511, 83 L. Ed. 950, 59 S. Ct. 605.

See, also:

Huddleson v. Dwyer, 322 U. S. 232, 88 L. Ed. 1246, 64 S. Ct. 1015.

The Supreme Court of Washington is the court of last resort and its decision is final. The court is comprised of two departments which alternate in hearing appellate cases, and unless a hearing *en banc* is granted, the departmental decision becomes final. In the case under consideration the Petition for Re-Hearing was denied and the departmental decision became final and was made and entered in Department II, consisting of Chief Justice Simpson and Associate Justices Mallery, (who wrote the opinion) Robinson, Hill, and Hamley.

QUESTIONS PRESENTED

I. Have petitioners been deprived of their constitutional guarantee of a fair and impartial trial where on appeal the state supreme court of last resort disregards established rules of evidence and principles

governing trials of malpractice cases brought against drugless healers and sanipractic physicians and refuses to consider evidence of experts presented under rules and principles as they existed prior to the opinion and decision of the supreme court, without affording petitioners the benefit of a new trial in accordance with the radically changed rules of evidence and principles laid down in such opinions and decision?

II. Have petitioners been deprived of their property rights and right of liberty in the pursuit of their profession, guaranteed under Amendment XIV of the Federal constitution in a malpractice case against a drugless and sanipractice physician in which the state supreme court of last resort discriminated against and denied equal protection of the law by its opinion and decision overruling established rules and principles governing the relation of drugless and sanipractic physicians and their patients, under which established rules and principles the case was tried in the trial court, without affording petitioners an opportunity to defend under the rules and principles established by the opinion and decisions?

III. Have petitioners been denied due process and equal protection of the law guaranteed by Amendment XIV of the Federal constitution, where in a mal-

practice action against a drugless and sanipractic physician has been discriminated against by a radical change in the rules and principles of practice and procedure in such cases, holding the prior established rules and principles are not applicable to drugless and sanipractic physicians, although they are applicable to medical physicians and surgeons, notwithstanding the fact that both are licensed to practice under the statutes of the state, and petitioners have complied with all statutory requirements?

IV. In a malpractice action against a drugless physician, has a state, by an opinion and decision of the court of last resort of that state, abridged petitioner's privilege and immunities and right of liberty in the practice of his profession by discriminating against petitioners in an opinion and decision which holds that petitioner may not use the title "Doctor," although he has complied with all of the statutory requirements in the practice of his profession?

STATEMENT

The respondent herein by her amended complaint (R. 1-16) brought action to recover $51,000.00 in damages for the alleged wrongful death of her husband. She alleged as acts of negligence on the part of the

petitioners a wrongful diagnosis followed by wrongful treatment. The petitioner O. G. Carroll is a licensed drugless and naturopathic physician and the petitioner Angela J. Carroll, his wife, was alleged under the amended complaint to have acted as his nurse and assistant in the treatment of respondent's husband. By their answer (R. 6-9) the petitioners categorically denied the allegations of wrongful diagnosis and wrongful treatment of the patient, and as an affirmative defense pleaded contributory negligence on the part of the patient and the respondent herein which proximately caused the death, which contributory negligence was denied by reply thereto (R. 12).

On the issues so joined the case was tried to the court sitting with a jury and resulted in a verdict and judgment in favor of the respondent against the petitioners for $15,837.35 and costs (R. 13). An appeal was taken by petitioners herein to the Supreme Court of Washington, and under date of May 31, 1950, the supreme court rendered its opinion and decision (R. 14-31) affirming the judgment.

On the trial of the action the trial court in its rulings and instructions, and the attorneys representing both petitioners and respondent herein observed and followed the rules and principles laid down in

the cases of *Brooks v. Herd,* 144, Wash. 173, 257 Pac. 238, and *Fritz v. Horsfall,* 24 Wn. (2d) 14, 163 P. (2d) 148, hereinafter discussed in the Argument, and by its opinion and decision (R. 32-77) the Supreme Court of Washington promulgated rules and principles diametrically opposed to the rules and principles under which the case had been tried, which had theretofore been the law of the state.

The violation of petitioners' right of a fair and impartial trial under the State and Federal Constitutions, and the violation by the decision of the guaranteed right of due process of law and equal protection of the law were presented to the supreme court by the Petition for Re-Hearing. The supreme court, however, refused to consider the petition, refused to grant a re-hearing *en banc*, and entered its order denying the petition (R. 79).

SUMMARY OF ARGUMENT

Where on appeal from the trial court's judgment in an action to recover damages for the alleged wrongful death of a patient under the care of a drugless healer, the State Supreme Court established rules and principles of law diametrically contrary to existing rules and principles governing such cases, and when on Petition for Re-Hearing (R. 32-77) such material

departure from the established rules and practices are called to the attention of the appellate court, and the claim is made that the petitioners have thereby been deprived of rights guaranteed them by the Fourteenth Amendment of the Federal constitution, and the court refuses to grant such re-hearing or give petitioners an opportunity to present their defense in the light of such new rules and principles established by such decision, is there a Federal question presented for which this court can give relief by way of certiorari?

ARGUMENT

As appears from the foregoing Statement, this is an action brought against a drugless and sanipractic physician to recover damages for the alleged negligent and wrongful diagnosis and treatment of a patient claimed to have resulted in the death of the patient. Trial of the case to the court sitting with a jury resulted in a verdict and judgment against petitioners herein, in the amount of $15,837.35 and costs, from which judgment and orders denying petitioners' motions for judgment *non-obstante veredicto* or in the alternative for a new trial an appeal was taken to the Washington Supreme Court.

At the time of the trial of the case in the lower court, the rules and principles governing cases of this nature had been promulgated and established by the Supreme Court of Washington in the cases of *Brooks v. Herd,* 144 Wash. 173, 257 Pac. 238, decided June 22nd, 1927, which declared:

> "In general, the court submitted the case to the jury upon perfectly proper instructions as to the law governing the relations of *physicians* and patients. Under the statutes above cited, drugless healers are strictly limited, each to his own school of practice, and forbidded to invade the field of practice of any other school of drugless healing or of any regular school of healing. *Otherwise, the principles of law governing the relations of regular physicians and surgeons and their patients govern as to drugless healers and their patients. Wilcox v. Carroll,* 127 Wash. 1, 219 Pac. 34. The court in general gave the same instructions in this case as should be given in an ordinary malpractice case by a patient against a practitioner of a regular school of healing, for negligent care and treatment."

and *Fritz v. Horsfall,* 24 Wn. (2d) 14, 163 P. (2d) 148, decided November 1st, 1945, wherein the Wash. ington Supreme Court cited and reviewed its holdings in a vast number of cases previously decided and said:

"Before referring to the facts, however, it seems advisable to set out certain general rules of law governing actions for malpractice which are almost universally accepted by the courts and which are applicable to the present situation. We set them out as follows: (1) An individual licensed to practice medicine is presumed to possess that degree of skill and learning which is possessed by the average member of the profession in the community in which he practices, and that he has applied that skill and learning with ordinary and reasonable care to those who come to him for treatment. (2) The contract which the law implies from the employment of a physician or surgeon is that the doctor will treat his patient with that diligence and skill just mentioned (citing cases). (3) He does not incur liability for his mistakes if he has used methods recognized and approved by those reasonably skilled in the profession (citing cases). (4) Before a physician or surgeon can be held liable for malpractice, he must have done something in the treatment of his patient which the recognized standard of medical practice in his community forbids in such cases, or he must have neglected to do something required by those standards. 48 C.J. 112. (5) In order to sustain a judgment against a physician or surgeon, the standard of medical practice in the community must be shown, and further, that

the doctor failed to follow the methods prescribed by that standard. (6) It is not required that physicians and surgeons guarantee results, nor that the result will be what is desired (citing cases). (7) *The testimony of other physicians that they would have followed a different course of treatment than that followed by the defendant, or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish negligence. In such cases, the court must hold that there is nothing upon which the jury may pass, the reason being that the jury must not be allowed to accept one theory to the exclusion of the other* (citing cases). (8) Negligence on the part of the physician or surgeon by reason of his departure from the popular standard of practice must be established by medical testimony (citing cases). The reason is that juries must be informed as to the facts or criterion upon and by which the standard of ordinary skill and ordinary care and diligence rests and is regulated by the medical profession. To supply the need, evidence may properly be introduced to show such facts. This evidence, from the very nature of the case, must come from men learned in the profession *because other witnesses are not competent to give it. Jurors and courts are not in any way conversant with what is entirely peculiar to the practice of medicine and*

> *surgery. They may not arbitrarily determine the proper methods of treating an ailment—that is a medical question. Ewing v. Goode,* 73 Fed. 442."

This case was tried strictly in accordance with the foregoing rules established by the Supreme Court of Washington in the cases above cited and quoted from. This fact is apparent from the opinion and decision (R. 14-31) of the Washington Supreme Court in this case, wherein it is said:

> "Pursuant to his theory, the appellant produced witnesses who were drugless healers, who supported his version of the facts as to the diagnosis and treatment of the deceased. It is appellant's position that a doctor of a particular school may practice according to the tenets of that school, and that the testimony of doctors of a different school, who disagree with such treatment, cannot establish negligence. In short, that a drugless healer must be tried upon the expert opinion of drugless healers only, and that they will not be liable if they follow the tenets of their school."

Nothwithstanding the fact that the rules and principles governing the relations of regular physicians and surgeons and their patients were declared in the case of *Brooks v. Herd, supra,* to govern as to drug-

less healers and their patients, and that in the case of *Fritz v. Horsfall, supra,* the rules and principles governing the relations of regular physicians and surgeons and their patients were laid down, in the opinion and decision (R. 14-31) of the case at bar the Washington Supreme Court radically departed from such established rules and principles and purported to establish diametrically opposite rules and principles governing the relations of drugless healers and their patients, as is apparent from the reading of the opinion and decision.

At the outset the writer of the opinion challenges petitioner's right to be referred to as a doctor and infers that because he was referred to as a doctor in the trial, in the briefs, and the argument he was practicing medicine, which he was not permitted to do under his license. The title "doctor" in its ordinary use, however, may refer to any person learned in some of the arts, skills, or professions, a scholar or teacher, and the title is not limited to those in the practice of medicine. There are doctors of law (LLD), doctors of divinity (DD), doctors of dental surgery (DDS), and doctors of philosophy (PHD), and innumerable other doctors learned and skilled in a particular profession or field.

The opinion further departs from the long established rules and principles in that it holds:

> "Drugless healers can not qualify as expert witnesses as to matters in the general realm of medicine and surgery * * * We are not here concerned with the testimony of a drugless healer as an expert in the field of drugless healing as permitted by law, but it is apparent that the field of drugless healing and medicine and surgery are not coextensive, and we are here concerned with the field in medicine and surgery that lies outside of the drugless healing field."

It is, therefore, obvious that the rules established by the case of *Brooks v. Herd, supra,* are entirely disregarded and the new rule established by the decision is to the effect that drugless healers may not testify as experts in their own fields. The opinion further establishes a new and radical rule to the effect that the question of whether or not the treatment in a particular case was correct must be determined by the testimony of expert witnesses from the medical school, "*who alone are qualified to speak.*"

The supreme court has by its opinion, which in effect is judicial legislation, deprived the drugless and naturopathic physicians of the right to follow the practices and tenets of their own school of healing if there is a possible remedy in the field of medicine

or surgery, and by such legislation has deprived them of due process of law or of any protection under the law if they practice or adopt methods dissimilar to the medical field.

As stated in 12 *Am. Jur.* 309 (Const. Law #616, "due process of law protects against arbitrary action. Arbitrary action by a tribunal in the hearing of a cause or in its order violates due process," citing:

> *Washington ex rel Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535.

It is the petitioner's position that where on appeal the Supreme Court of Washington has arbitrarily established rules of law governing the relations of drugless healers and their patients contrary to the established rules, there has been such a departure from the settled law this court should consider and give effect to the law as it now exists following such declaration. As said in 54 *Am. Jur.* 898 (U. S. Courts #261):

> "Although it is generally the province of the Supreme Court on certiorari to inquire whether the judgment of the court below is correct on the record and in the light of the law and facts existing at the time the judgment was rendered, yet the court has power not only to correct errors in

the judgment under review, *but to make such disposition of the case as justice requires, and to that end it is bound to consider and give effect to any change,* either in law or in fact which has supervened since the judgment was entered, and, *if necessary set aside the judgment if it is in violation of that fact or law."*

Ashcraft v. Tennessee, 322 U. S. 143, 88 L. Ed. 1192, 64 S. Ct. 921;

State Tax Commission v. Van Cott, 306 U. S. 511, 83 L. Ed. 950, 59 S. Ct. 605;

Patterson v. Alabama, 294 U. S. 600, 79 L. Ed. 1082, 5 S. Ct. 575;

Huddleston v. Dwyer, 322 U. S. - L. Ed. 1246, 64 S. Ct. 1015.

CONCLUSION

The petitioners believe that from the record in this case it appears that the rights guaranteed under the Fourteenth Amendment to the Federal constitution have been denied them, and they have been denied not only due process of law and equal protection of the law, but that the arbitrary action of the Supreme Court of the state of Washington in establishing radically different rules and principles governing the trial of cases of the nature under consider-

ation, without affording petitioners an opportunity to meet such rules and principles, can and should be reviewed by this court and by the disposition of this case the court should see that petitioners are granted the rights which have been denied them.

Respectfully submitted,

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INDEX—SUBJECT MATTER

	Page
Preliminary Statement	2
No Federal Question	4
No Former Case Overruled	4
Federal Claim Too Late	7
Theory on Which Case Was Tried to Jury Not Shown	9
Claim Too General	10
Police Power and Stare Decisis	12
No Federal Grounds	14
No Important Reason to Assume Jurisdiction	19

TEXTS

	Page
U. S. Sup. Ct. Rule 38, Sec. 5	19
11 Am. Jur. P. 1202, Sec. 374	13
36 C. J. S. 172	13

CASE INDEX

Page

Applewhite v. Wayne, 152 Wash. 62, 277 P. 84 14

Baldwin v. State of Kansas, 129 U. S. 52, 32 L. ed. 640 8

Brinkerhoff-Faris Trust & Savings Co. v. Walter O. Hill, 281 U. S. 673-682, 74 L. ed. 1107 8

Brooks v. Herd, 144 W. 173, 257 Pac. 238 6

California Powder Works v. Davis, 151 U. S. 389, 38 L. ed. 206, 14 S. Ct. Rep. 350 12

Capital City Dairy Co. v. Ohio, 183 U. S. 238, 46 L. ed. 171, 22 S. Ct. Rep. 120 11

Central Pac. R. R. Co. v. California, 162 U. S. 90, 40 L. ed. 903 13

Chicago & N. W. R. R. Co. v. Chicago, 164 U. S. 454, 41 L. ed. 511, 17 S. Ct. Rep. 129 11

Clarke v. McDade, 165 U. S. 168, 41 L. ed. 673, 17 S. Ct. Rep. 284 11

Cleveland & Pittsburg Ry. Co. v. City of Cleveland, 235 U. S. 50, 59 L. ed. 127 12

Connecticut ex rel New York & N. E. Ry. Co. v. Woodruff, 153 U. S. 689, 38 L. ed. 869, 14 S. Ct. Rep. 976 15

Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 S. Ct. Rep. 131 15

Farney v. Towle, 1 Black 350, 17 L. ed. 216 11

Fisher v. Berg, 158 W. 176, 290 P. 984 18

Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1085, 17 S. Ct. Rep. 665 20

French v. Hopkins, 124 U. S. 524, 31 L. ed. 536, 8 Sup. Ct. Rep. 589 12

Page

Fritz v. Horsfall, 24 Wash. (2d) 14, 163 Pac. 148.... 7

Gephart v. Stout, 11 Wash. (2d) 184, 118 Pac. (2d) 801.... 10

Grass v. City of Seattle, 100 Wash. 542, 171 Pac. 533 15

Gray v. W.W.P. Co., 30 Wash. 665, 71 Pac. 206.... 15

Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U. S. 358-367, 77 L. ed. 360.... 8

Hardin v. Millin, 16 Wash. 647, 48 Pac. 349.... 15

Hawkins v. Casey, 38 Wash. 625, 80 Pac. 792.... 18

Herndon v. Georgia, 295 U. S. 441, 79 L. ed. 1530, 55 S. Ct. Rep. 794.... 8

Hoyt v. Shelden, 1 Black 518, 17 L. ed. 65.... 11

Johnson v. New York L. Ins. Co., 187 U. S. 491, 47 L. ed. 273, 23 S. Ct. Rep. 194.... 12

Kellogg v. Cook, 18 Wash. 516, 52 Pac. 233.... 15

King v. W. Va., 216 U. S. 90, 54 L. ed. 396.... 12

Machenheimer v. Falknor, 151 Wash. 447, 276 Pac. 297.... 14

Manning v. French, 133 U. S. 186, 33 L. ed. 582, 10 S. Ct. Rep. 258.... 12

Maxwell v. Newbold, 18 How. 511, 15 L. ed. 506.... 11

Moore-Mansfield Const. Co. v. Electrical Installation Co., 234 U. S. 617, 58 L. ed. 1503.... 12

Morrison v. Watson, 154 U. S. 111, 38 L. ed. 927, 14 S. Ct. Rep. 995.... 12

New York C. & H. R. R. Co. v. New York, 186 U. S. 269, 46 L. ed. 1158, 22 S. Ct. Rep. 916.... 11

Onondaga Nation v. Thacher, 189 U. S. 306, 47 L. ed. 826, 23 S. Ct. Rep. 636.... 12

Page

Re Woods, 143 U. S. 202, 36 L. ed. 125, 12 S. Ct. Rep. 417 20

Rogers v. Jones, 214 U. S. 196, 53 L. ed. 965, 29 S. Ct. Rep. 635 15

Ross v. Oregon, 227 U. S. 149, 57 L. ed. 458 13

Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 S. Ct. Rep. 777 12

Schmidt v. Cook Brewing Co. (Ind.), 3 A.L.R. 270 .. 14

Schlotfeldt v. Ball, 18 Wash. 64, 50 Pac. 590 19

Schuyler Nat. Bank v. Bullong, 150 U. S. 85, 37 L. ed. 1008, 13 S. Ct. Rep. 24 11

Shook v. Hughes, 146 Wash. 134, 262, Pac. 142 14

Smith v. State of Miss., 162 U. S. 591, 40 L. ed. 1082 12

State v. Hauck, 32 Wash. (2d) 681, 203 Pac. (2d) 693 8

State v. Karsunky, 197 Wash. 87, 84 P. (2d) 390 8

State v. Lydon, 170 Wash. 354, 166 P. (2d) 848 8

State v. McCann, 16 Wash. 249, 47 Pac. 443 18

State v. Severns, 13 Wash. (2d) 542, 125 Pac. (2d) 659 10

State v. Sterling, 147 Wash. 222, 265 Pac. 472 18

Wear v. State of Kansas, ex rel S. W. Brewster, 245 U. S. 153, 62 L. ed. 214 17

Wilcox v. Carroll, 127 Wash. 1, 219 Pac. 34 6

Willoughby v. Chicago, 235 U. S. 44, 59 L. ed. 123 13

Wood v. Brady, 150 U. S. 17, 37 L. ed. 981 12

Worthy v. Moore County, 9 Wall. 611, 19 L. ed. 565 12

PRELIMINARY STATEMENT

The complaint in this action sets out various negligent acts of a drugless healer, O. G. Carroll, constituting malpractice. Only part of the alleged acts of negligence would require proof by expert testimony. (R. 1-6).

The case was submitted to the jury upon instructions which are not before this Court. No exceptions to these instructions are before this Court.

A statute of the State of Washington permits drugless healers to administer to patients within prescribed limits. A prior decision of the Supreme Court of Washington held that within the limits of practice permitted to drugless healers, their relationship to their patients was the same as that of physician and patient, but did not enlarge the limits of drugless healing practice.

In the instant case a judgment of malpractice was entered on a jury's verdict against petitioner, a drugless healer, for negligent treatment of respondent's husband suffering from appendicitis resulting in his death. (R-13). Petitioners insisted, on trial, that testimony be limited to that of drugless healers. (R. 80-84).

On appeal the Supreme Court of Washington affirmed and held that the statute prohibited drugless

healers from treating medical cases, that it was negligence for petitioner to attempt to treat appendicitis instead of referring the case to a medical doctor as soon as he should have suspected that the patient was suffering from appendicitis; that under the statute such healers are not doctors and can not testify as experts on a medical question. (R. 14-31).

Petitioners petitioned for a rehearing to grant them a new trial. (R. 33-77).

The petition for rehearing was denied without any opinion. (R. 79).

Petitioner in the present proceeding urges that the Supreme Court of the State of Washington should be required to consider his petition in that Court as if expert testimony of his drugless healers were admissible on medical questions, or grant him a new trial in which he might conceivably produce expert testimony in his favor from medical doctors.

Respondent contends:

a. That no federal question is involved.

b. That there is nothing to show that the petition for rehearing to grant a new trial was not based entirely upon non-federal grounds.

c. That there is no special or important reason in this case compelling the Supreme Court of the United States to assume jurisdiction.

NO FEDERAL QUESTION

There is no Federal Question upon which this Court can pass

1. Because no former decision was overruled by the State Supreme Court.

2. Because the theory upon which the case was tried to the jury was not before the State Supreme Court.

3. Because the claim to the State Court that a constitutional right had been invaded was entirely too general to be considered.

4. Because the principle of stare decisis has no application to matters within the police power of the State.

NO FORMER CASE OVERRULED

Prior to this decision the Supreme Court of the State of Washington had ruled that the conduct of a drugless physician, when practicing within the limits of his license, should be measured in a malpractice case by the standards of his own school of healing. In such cases, only those of his own school might qualify as experts. But the Supreme Court had never decided that this rule would apply in a malpractice action to a drugless physician who was practicing beyond the limits of his license. By statute, a drugless physician is limited to a practice that does not include

surgery or the prescribing of medicine. In the case at bar petitioner, O. G. Carroll, was found to have been caring for an appendicitis patient who required medical and surgical attention. Petitioners were also found to have prescribed two doses of castor oil of four tablespoons each as well as other laxatives. These facts, among others, having been found, the Supreme Court held in the case at bar that no drugless physician could qualify as an expert because the facts showed that said O. G. Carroll was not practicing within the limits of his license. (R. 14-33). The Supreme Court further in the case at bar held that a drugless physician is required to refer immediately to an M. D. any of his patients who require medical attention. The basis of this rule had been shown in criminal cases wherein drugless physicians had been charged with practicing medicine or surgery. In these cases, medical doctors and surgeons, licensed as such, had been permitted to testify as experts. It is not necessary to analyze these cases here since the Supreme Court in the case at bar analyzed them and chose to follow them. (R. 17-22). The Court does not state that it is overruling any former decision. As we have stated, no former decision is thereby overruled. Opinions in former malpractice cases are merely held not to cover those cases where a drugless physician is practicing beyond the limits of his license by invading the field of medicine, and the rule in malpractice cases is made to conform with the rule in

criminal cases. Such a decision does not offend against the rule of stare decisis nor is any vested right of appellants invaded. No federal question exists.

In the case of *Brooks v. Herd,* 144 Wash. 173, 257 Pac. 238, relied upon by petitioners, the Court says:

> "In general, the court submitted the case to the jury upon perfectly proper instructions as to the law governing the relations of physicians and patients. Under the statutes above cited, drugless healers are strictly limited, each to his own school of practice, and forbidden to invade the field of practice of any other school of drugless healing or of any regular school of healing. *Otherwise,* the principles of law governing the relations of regular physicians and surgeons and their patients govern as to drugless healers and their patients. *Wilcox v. Carroll,* 127 Wash. 1, 219 Pac. 34." (Italics ours.)

By use of the word "Otherwise" in the last quoted sentence, the Court is very careful to indicate that different principles of law would or might apply in a case where a drugless healer had invaded a forbidden field of practice. It certainly does not indicate that in such a case the same rules would apply. By citing *Wilcox v. Carroll,* supra, as authority for this statement, it is also evident that, in the mind of the Court, that case is not authority for any different interpretation of the law. In the field where drugless physicians are permitted to practice, instructions may give them the benefit of the same rules that govern

medical doctors and their patients. Outside those limits, other rules must apply. Because of the peculiar manner in which these cited cases were submitted to the jury, only the general rule was therein considered.

We do not know in the case of *Brooks v. Herd*, supra, if testimony of medical doctors was offered or objected to or refused. That would not be apt to appear in the Supreme Court record except upon the appeal of the plaintiff. In this case the appealing party was the drugless physician who would not be found complaining upon any such ground. At any rate, the record does not show that any such matter was presented to the Court.

Fritz v. Horsfall, 24 Wash. (2d) 14, 163 Pac. 148 is an action in malpractice against a physician and surgeon, not a drugless healer, and is not therefore in point.

FEDERAL CLAIM TOO LATE

The attempt of petitioners to claim that a constitutional right had been invaded first occurred in their petition to the Washington Supreme Court for a rehearing. (R-35). This was too late according to the general rule. There is an exception to the general rule which permits the United States Supreme Court, nevertheless, to assume jurisdiction where a new basis of claim arises out of the decision of the State Supreme

Court, provided that the decision could not have been anticipated. The State Supreme Court points out that Remington's Revised Statutes, Section 10124 prohibits the drugless healer from designating himself as a doctor. (R-16), that drugless healers were convicted of practicing medicine in the following cases: *State v. Lydon,* 170 Wash. 354, 166 P. (2d) 848; *State v. Karsunky,* 197 Wash. 87, 84 P. (2d) 390; *State v. Hauck,* 32 Wn. (2d) 681, 203 P. (2d) 693, (R. 18-21); that in at least one of these cases medical doctors furnished most of the expert testimony. We have pointed out that previous malpractice decisions did not expressly cover a case where the Court had instructed concerning the conduct of a drugless physician, practicing beyond the limits of his license. Considering the statute and the holdings of the Court relating to drugless physicians, it would seem that a careful attorney should have anticipated the Court's decision. If the decision should have been anticipated then there is no federal question before this Court of which it will assume jurisdiction. *Herndon v. Georgia,* 295 U. S. 441, 79 L. ed. 1530, 55 S. Ct. 794, *Brinkerhoff-Faris Trust & Savings Co. v. Walter O. Hill,* 281 U. S. 673-682, 74 L. ed. 1107, *Great Northern Railway Co. v. Sunburst Oil & Refining Co.,* 287 U. S. 358-367, 77 L. ed. 360.

In *William Baldwin v. State of Kansas,* 129 U. S. 52, 32 L. ed. 640, the Court says:

"If the right was not set up or claimed in the proper Court below, the judgment of the highest court of the State in the action is conclusive so far as the right of review is concerned.

"The question whether the evidence in the case was sufficient to justify the verdict of the jury and the question whether the constitution of the State of Kansas was complied with or not in the proceedings on the trial which are challenged are not federal questions which this court can review."

THEORY ON WHICH CASE WAS TRIED TO JURY NOT SHOWN

Furthermore, it is incumbent upon petitioners to show under what theory the case went to the jury before they can claim that it was tried upon a wrong theory. The opinion of the Supreme Court sets out various instructions to the jury requested by petitioners and refused by the trial Court. (R. 24-28). These instructions were held rightly rejected because they would have told the jury that the conduct of petitioner, Carroll, although he was practicing beyond the limits of his license, should be measured only by the standards of his own school. These were the only instructions considered by the State Supreme Court or called to its attention. They no doubt show that petitioners sought to have the case tried on that theory. But is that sufficient to show on what theory or pursuant to what instructions the case was submitted to the jury? There is nothing in the record that shows that the

State Supreme Court ever had called to its attention instructions that were actually given by the Trial Court to the jury. Even in petitioners' petition for a rehearing the attention of the State Supreme Court is not called to instructions to the jury given by the Trial Court. Under our practice in the State of Washington questioned instructions must be quoted in full in order to be passed upon by the Supreme Court. *State of Washington v. Harry Severns,* 13 Wn. (2d) 542, 125 P. (2d) 659; *Gephart v. Stout,* 11 Wn. (2d) 184, 118 P. (2d) 801. Petitioners did not quote any instructions and did not point to any instructions in their petition for a rehearing. The theory upon which the case was tried to the jury therefore was not before the State Supreme Court. Neither is it before this Court. The mere claim of petitioners that the case was tried upon a certain theory fails to establish that it was tried upon that theory. No federal question is therefore before this Court.

CLAIM TOO GENERAL

The only place in petitioners' petition for rehearing and in fact the only place in the entire record where the constitution of the United States is even mentioned, appears in Paragraph I of their petition for rehearing before the Supreme Court of the State of Washington. (R-35). The reference is as follows:

"The opinion completely ignores the doctrine

> of stare decisis and in this case the failure to recognize the doctrine deprived the appellant of the fair and impartial trial guaranteed by the constitutions of the United States and the State of Washington."

At several points in the petition for rehearing there is the statement that "appellant did not have his constitutionally guaranteed right of a fair and impartial trial," but there is no further reference in the entire petition to the constitution of the United States. Other than as quoted, there is nothing to indicate whether the constitutional right, which appellants allege was invaded, was one established by the State of Washington or by the United States. There is no section of the constitution of the United States referred to. The claim therefore was entirely too general for consideration by the Court and no federal question was raised.

Maxwell v. Newbold, 18 How. 511, 15 L. ed. 506; *Hoyt v. Shelden,* 1 Black 518, 17 L. ed. 65; *Farney v. Towle,* 1 Black 350, 17 L. ed. 216; *Capital City Dairy Co. v. Ohio,* 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120.

New York C. & H. R. R. Co. v. New York, 186 U. S. 269, 46 L. ed. 1158, 22 Sup. Ct. Rep. 916.

Clarke v. McDade, 165 U. S. 168, 41 L. ed. 673, 17 Sup. Ct. Rep. 284.

Chicago & N. W. R. Co. v. Chicago, 164 U. S. 454, 41 L. ed. 511, 17 Sup. Ct. Rep. 129; *Schuyler Nat.*

Bank v. Bullong, 150 U. S. 85, 37 L. ed. 1008, 13 Sup. Ct. Rep. 24; *Manning v. French,* 133 U. S. 186, 33 L. ed. 582, 10 Sup. Ct. Rep. 258; *Worthy v. Moore County,* 9 Wall, 611, 19 L. ed. 565; *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; *Sayward v. Denny,* 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Morrison v. Watson,* 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; *French v. Hopkins,* 124 U. S. 524, 31 L. ed. 536, 8 Sup. Ct. Rep. 589; *California Powder Works v. Davis,* 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; *Onondaga Nation v. Thacher,* 189 U. S. 306, 47 L. ed. 826, 23 Sup. Ct. Rep. 636.

POLICE POWER AND STARE DECISIS

Assuming that the theory on which the case was tried is before this Court and that former decisions were overruled by the State Court, still there would be no federal question involved. The State Court has the power to overrule its own decision.

Henry C. King v. W. Va., 216 U. S. 90, 54 L. ed. 396.

Moore-Mansfield Construction Co. v. Electrical Installation Co. 234 U. S. 617, 58 L. ed. 1503.

Smith v. State of Miss., 162 U. S. 591, 40 L. ed. 1082.

Wood v. Brady, 150 U. S. 17, 37 L. ed. 981.
Cleveland & Pittsburgh R. R. Co., et al v. City of

Cleveland, Ohio, 235 U. S. 50, 59 L. ed. 127.

Petitioners had no vested right in rules governing the competency of witnesses.

Central Pac. R. R. Co. v. People of the State of California, 162 U. S. 90, 40 L. ed. 903.

J. Thomburn Ross v. State of Oregon, 227 U. S. 149, 57 L. ed. 458.

Frank J. Willoughby v. City of Chicago, 235 U. S. 44, 59 L. ed. 123.

We quote from 36 C. J. S., P. 172:

> "A decision of a State Court with respect to a question of evidence will not be reviewed by the Supreme Court of the United States, unless a Federal question is involved.
>
> "The United States Supreme Court cannot ordinarily review a decision of a State Court as to the propriety of taking or refusing to take judicial notice of a particular matter or the admissibility of sufficiency of evidence."

We quote from 11 Am. Jur. P. 1202, Sec. 374:

> "In general, no such thing as a vested right in a rule of evidence is recognized."

The police power of the state has always included the right to determine the qualifications of those who care for the sick and to limit licenses to those only who have met such qualifications. A license therefore is as necessary to qualify as an expert witness as it is

to be permitted to treat the sick. Since it is not claimed that anyone able to meet the test necessary to obtain a medical license is denied the right to obtain such license, no federal question is here involved.

The principle of stare decisis has no application to the police power:

> *Schmidt v. F. W. Cook Brewing Co.* (Ind.) 3 A. L. R. 270.

NON-FEDERAL GROUNDS

The petition of petitioners for a rehearing was essentially a petition for a new trial. It was denied by the Washington Supreme Court without stating the reasons for the denial. Unless the judgment granting or denying a new trial states the specific ground upon which it is based, then the Appellate Court will not reverse such judgment if it could be supported upon any ground.

> *Machenheimer v. Falknor,* 151 Wash. 447, 276 P. 297.
>
> *Shook v. Hughes,* 146 Wash. 134, 262 P. 142.
>
> *Applewhite v. Wayne,* 152 Wash. 62, 277 P. 84.

It must appear that the decision could not have been made under the rules of general jurisprudence broad enough in themselves to sustain the judgment

without considering the alleged federal question. *Eustis v. Bolles,* 150 U. S. 361, 37 L. Ed. 1111, 14 S. Ct. 131; *Connecticut ex rel New York and N. E. Railway Company v. Woodruff,* 153 U. S. 689, 38 L. Ed. 869, 14 S. Ct. 976; *Rogers v. Jones,* 214 U. S. 196, 53 L. Ed. 965, 29 S. Ct. 635.

> "A judgment will not be reversed because of error in giving or refusing instructions when the verdict rendered is manifestly in accordance with the evidence."
>
> *Kellogg v. Cook,* 18 W. 516, 52 P. 233.
>
> *Hardin v. Mullin,* 16 W. 647, 48 P. 349.
>
> *Gray v. W.W.P. Co.,* 30 W. 665, 71 P. 206.
>
> *Grass v. City of Seattle,* 100 W. 542, 171 P. 533.

Petitioner, O. G. Carroll, admitted upon the trial that he applied the sine wave massage machine with too much violence for an appendicitis case; admitted that moving an appendicitis patient is bad and that such a patient who is not moved would be more apt to recover; that an appendicitis patient who is given food would be less apt to recover. (R. 84-86). The patient involved was given such treatment. No expert testimony was therefore required to prove these facts. They stand admitted. In denying a demand for a rehearing to grant a new trial the Supreme Court could well have decided that with all these admissions in the record no different decision could be arrived at upon

a subsequent trial and that the verdict was manifestly in accordance with the evidence irrespective of any expert testimony.

Petitioners in their petition for a rehearing set up six grounds therefor. One of these grounds, the 5th, concerned their belief that the giving of castor oil, which was alleged in the complaint as a ground of negligence, does not constitute the practice of medicine. (R-37). Whether or not the giving of castor oil constitutes the practice of medicine under the Washington statutes is purely a question of state law. There had never been any decision of our court holding it did not constitute the practice of medicine. Petitioners' witness, Spitler, a drugless physician, who, they claim, is also an M.D., testified that the giving of four tablespoonsful of castor oil would be very bad for an appendicitis patient. (R-86). But the Court could have taken judicial notice of that fact. The Court also could have based its refusal to grant a new trial on this point without any reference to the question raised herein.

Among other allegations of negligence contained in the complaint was an allegation that petitioner O. G. Carroll left the city and thus negligently absented himself from his patient at a time when his patient was critically ill. (R-5). Evidence to that effect did not require expert testimony. The Supreme Court could have refused a new trial on that ground with-

out passing upon the alleged constitutional question raised by petitioners.

One of the grounds upon which the petition for rehearing to grant a new trial was based was the contention of petitioners that the Court could not take judicial notice that appendicitis is a disease requiring the care of an M. D. (R-36). It requires no testimony, medical or otherwise, to prove that of which the Court takes judicial notice. It would be impossible, therefore, for the appellants to be injured by the failure of the Court, if there was such failure, to consider expert testimony concerning the matter. Liability for malpractice would follow when it was shown that a drugless physician was treating a medical case. The constitution does not prohibit a state court from taking judicial notice of any generally known fact.

See *Norman S. Wear v. State of Kan. ex rel S. W. Brewster,* 245 U. S. 153, 62, L. Ed. 214.

Respondent contends in her complaint, among other acts of negligence, that petitioners were negligent in failing to refer her husband's case to a medic and instead telling her repeatedly that she did not need an M. D. and if she got one such M. D. will kill her husband. (R. 2-3). The jury found with her. The Supreme Court also found that petitioner, O. G. Carroll, was guilty of negligence and of malpractice in failing to refer the case to an M. D. This holding was

based upon the fact that Carroll was not licensed to care for a medical case. It required no expert testimony to prove this fact.

Petitioners objected upon the trial to the jury to any expert testimony by medical doctors. (R. 80-84). Neither instructions given nor exceptions thereto appear. It is very evident that petitioners considered it beneficial to shut out medical testimony. So they invited erroneous rulings of the Court. They requested that testimony of their drugless healer witnesses be presented to the jury as expert testimony. Some of the testimony of medical witnesses offered by respondent was, upon appellants' objection, ruled out. Now that the Supreme Court has determined that the drugless healer witnesses were not entitled to give expert testimony in a medical case, and, having lost out, petitioners seek a new trial. It has always been the law that a new trial will not be granted because of erroneous rulings unless those rulings be prejudicial. *State v. Sterling,* 147 Wash. 222, 265, Pac. 472; *Fisher v. Berg,* 158 Wash. 176, 290 Pac. 984. The trial objections of petitioners to medical testimony show that if any erroneous instructions were given they themselves did not consider them prejudicial. They wanted rulings to that effect. Not only would such instructions not be prejudicial, they would be invited. Rulings cannot be questioned on appeal, if not excepted to. *Hawkins v. Casey,* 38 Wash. 625, 80 P. 792; *State v.*

McCann, 16 Wash. 249, 47 P. 443; *Schlotfeldt v. Ball,* 18 Wash. 64, 50 P. 590. The Supreme Court, therefore, could have denied a new trial upon this ground which would not have involved any federal question.

The State Supreme Court could have granted a new trial also on its own motion if the judges had believed that petitioners had not had a fair trial. It was equally in its power to deny a new trial where the error complained of would be advantageous to those complaining, was invited by them and was not excepted to by them. It seems to be the rule of all Courts of record that error may not be invited and must be duly excepted to in order that any advantage thereof may be taken on appeal. Such rules do not invade any constitutional right.

NO IMPORTANT REASON TO ASSUME JURISDICTION

U. S. Supreme Court Rule 38, Section 5, provides that

> "A review on writ of certiorari is not a matter of right but of sound discretion and will be granted only where there are special and important reasons therefor."

In the case at bar the Supreme Court of the State did not establish any rule with respect to stare decisis not in accord with the applicable decisions of the fed-

eral courts. The state decision extended, but did not reverse, any former decision.

There is no special or important reason why the federal court should assume jurisdiction. It is important, if at all, only to petitioners, but it is not of importance even to them since if the trial court did instruct the jury on the wrong theory (which we insist has not been shown), that theory would have been favorable to petitioners and they could not have been injured thereby. Could you be convinced that appellants would be favored, before a jury, by having their conduct of an appendicitis case judged by medics as experts instead of by their own school? They show by their own objections to medical testimony on cross-examination that they did not wish to permit medics to testify. (R. 80-84). Such a record does not present any reason sufficiently special or important to warrant the federal court to assume jurisdiction. See re *Woods* 143 U. S. 202, 36 L. Ed. 125, 12 Sup. Ct. Rep. 417. *Forsyth v. Hammond,* 166 U. S. 506, 41 L. Ed. 1095, 17 Sup. Ct. Rep. 665.

The petition should be dismissed.

Respectfully submitted,

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OCT 17 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 369

O. G. CARROLL AND ANGELA J. CARROLL, HUSBAND AND WIFE,

Petitioners,

vs.

LAURETTA KELLY, AS ADMINISTRATRIX OF THE ESTATE OF MORRIS C. KELLY, DECEASED

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

CLARENCE C. DILL,
Counsel for Petitioners.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinions below	2
Jurisdiction	2
Questions presented	4
Statement	5
Reasons for granting the writ	10
Conclusion	11
Appendix A—Rule 22 of the Supreme Court of Washington	12

Cases Cited

Brooks v. *Herd*, 144 Wash. 173, 257 Pac. 238	4, 6, 10
Fritz v. *Horsfall*, 24 Wash. (2d) 14, 163 P. (2d) 148	4, 7, 10

Statute Cited

28 U. S. C. 1257(3)	2

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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

The petitioners, O. G. Carroll and Angela J. Carroll, husband and wife, pray that a writ of certiorari issue to review the judgment, opinion and decision of the Supreme Court of the State of Washington, and the order denying petitioners' Petition for a Rehearing in cause No. 31182 entitled O. G. Carroll and Angela J. Carroll, husband and wife, appellants, *vs.* Lauretta Kelly, as administratrix of the estate of Morris C. Kelly, deceased, respondent. The judgment, opinion and decision was rendered and filed May 31, 1950, and the Order denying said Petition for Rehearing was made and filed July 19, 1950.

Opinions Below

The judgment, opinion and decision of the Supreme Court of the State of Washington (R. 14-31) is reported in 136 Wash. Dec. 445 and 219 P. (2d) 79, and the decision and order denying petitioners' Petition for Rehearing (R. 79) reported in 136 Wash. Dec. 791.

Jurisdiction

The judgment and decision of the Supreme Court of the State of Washington was made and filed on May 31, 1950, and within the time prescribed by Rule 22 of the Rules of the Supreme Court of Washington, Appendix "A" (*infra* p. 12) the petitioners filed in the Supreme Court of the State of Washington their Petition for Rehearing (R. 32).

It is the contention of the petitioners that this court has jurisdiction under the provisions of 28 U. S. C. 1257(3) in that:

I. The opinion of the Supreme Court of the State of Washington will deprive the petitioners of their right of property and right to liberty in the pursuit of their profession without due process of law, contrary to the provisions of Amendment XIV of the Constitution of the United States.

II. The opinion of the Supreme Court of the State of Washington abridges the privileges of the petitioners and is discriminatory, contrary to the provisions of Amendment XIV of the Constitution of the United States.

III. The opinion of the Supreme Court of the State of Washington denies the equal protection of the law within the jurisdiction of the State of Washington to the petitioners, contrary to the provisions of Amendment XIV of the Constitution of the United States.

The Supreme Court of the State of Washington is the court of last resort and its decision is final. It consists of

nine (9) Justices who comprise two (2) departments, designated as Departments I and II, which departments alternate hearing appellate causes, one of the nine (9) Justices acting as Chief Justice of both departments; that is, each department is constituted of the Chief Justice and four (4) Associate Justices. Unless, therefore, a hearing en banc is granted the decision of the majority of the Justices of each department is the final decision of the court. The decision and opinion of the court (R. 14 was made and entered by Department II, the opinion having been written by Justice Mallery and concurred in by Chief Justice Simpson and Justices Robinson, Hill, and Hamley. Appellants' Petition for Rehearing was denied and no en banc hearing was granted. Under Rule 22 of the Rules of the Supreme Court of the State of Washington (Appendix A, *infra* p. 12), a Petition for Rehearing shall be filed within thirty (30) days after the opinion is rendered, and the filing of such Petition shall suspend the decision of the court until the cause is finally determined. A Petition for Rehearing was filed with the Clerk of the Supreme Court of the State of Washington on June 28, 1950, within thirty (30) days after the filing of the judgment, decision and opinion, and under Rule 22 the decision of the court was suspended until July 19, 1950, when the Order Denying the Petition for Rehearing was entered.

The federal question on which petitioners rely had its inception and was created by the wholly unanticipated and unexpected decision of the Supreme Court of the State of Washington, written by the Honorable Justice Mallery and filed as of May 31, 1950 (R. 14), which opinion overruled the long established rules and principles governing the practice and procedure applicable to the trial in malpractice cases, under which rules and principles the case had been tried in the lower court, as hereinafter set out under the headings, "Questions Presented," and "Reasons for Grant-

ing the Writ." The federal question, therefore, arose for the first time in the Washington Supreme Court upon the decision of the court and the Petition for Rehearing, no prior opportunity having been presented to raise such federal question.

The long established principles of law governing the relation of regular physicians and surgeons and their patients also govern the relationship of drugless physicians and sanipractors and their patients. These general principles are set out in the Washington cases of *Brooks* v. *Herd,* 144 Wash. 173, 257 Pac. 238, and *Fritz* v. *Horsfall,* 24 Wash. (2d) 14, 163 P. (2d) 148, for many years a leading case, and indicate that the rules of law governing actions for malpractice as to regular physicians apply to drugless healers and sanipractors. These cases are discussed under the heading, "Reasons for Granting the Writ."

Questions Presented

I. Has a defendant been deprived of his constitutional guarantee of a fair and impartial trial in a case where the state court of last resort disregards the established rules of evidence of prior decisions of that state, and refuses to consider in its opinion evidence of experts presented under the rules of evidence as they existed prior to the decision of the court, without permitting the defendant the benefit of a new trial in accordance with the radically changed rules of evidence?

II. Has a defendant been deprived of his property rights and his right of liberty in the pursuit of his profession under Amendment XIV of the Constitution of the United States in a malpractice case against a drugless physician in which the state court of last resort discriminated against and denied the equal protection of the law by a decision and opinion overruling the established general rules of such state governing the relation of drugless physicians and their patients, under which established rules the case was tried, and establish-

ing radically different rules and principles discriminating against drugless physicians and different from those applied to medical practitioners without affording the defendant the opportunity to defend under the rules and principles established by the decision?

III. Has a defendant been deprived of the equal protection of the law of a state where in a malpractice action such defendant is denied the established protection of the law of that state by reason of the fact that he is a drugless physician and is discriminated against by a radical change in the rules of evidence, holding that such rules of evidence are not applicable to a drugless physician although they are applicable to other physicians and surgeons, notwithstanding the fact that both are licensed to practice under the statutes of the state and the defendant had complied with all statutory requirements?

IV. In a malpractice action against a drugless physician has a state, by an opinion of the court of last resort of that state, abridged a defendant's privileges and immunities and right of liberty in the practice of his profession by discriminating against such defendant in an opinion which holds that such defendant may not use the title "Doctor," although he has complied with all of the statutory requirements of such state in the practice of his profession?

Statement

As shown by the amended complaint (R. 1) this is an action to recover damages for the alleged wrongful death of one Morris C. Kelly, brought by the administratrix of his estate, against the petitioner O. G. Carroll, a drugless physician, and his wife. The answer (R. 6) denied the allegations of negligence and pleaded contributory negligence as an affirmative defense. The case was tried to the court sitting with a jury, and resulted in a verdict in favor of the plaintiff (respondent herein) against the defendants (peti-

tioners herein) in the amount of $15,837.35. Motions for judgment *non obstante veredicto* or in the alternative for a new trial were made by the defendants and denied by the court and judgment was entered on the verdict, from which an appeal was taken to the Supreme Court of the State of Washington. On the appeal the court rendered its opinion and decision (R. 14) reported in 219 P. (2d) 79, and within the time prescribed by the rules of the supreme court (Rule 22, Rules of Supreme Court of Washington (Appendix "A", p. 12 *infra*), petitioners presented to the Supreme Court of Washington their Petition for Rehearing (R. 32). The petition presented to the court for the first time petitioner's claim that by reason of the fact its opinion and decision overruled the long established general rules and principles laid down by the court, and followed by the parties on the trial of the action, and established different and entirely revolutionary rules as applied to malpractice cases involving drugless physicians, that the constitutional rights of petitioners, under Amendment XIV of the Constitution of the United States had been violated and that they had been or would be deprived of their property and their right of liberty in the pursuit of their profession without due process of law, and have been discriminated against and denied equal protection of the law. The Petition for Rehearing was denied (R. 29).

Under date of June 22, 1927, the Supreme Court of the State of Washington by its decision in the case of *Brooks* v. *Herd*, 144 Wash. 173, 257 Pac. 238, laid down the principles of law governing the relations of drugless physicians and their patients in the following language:

> "Under the statutes above cited, drugless healers are strictly limited, each to his own school of practice, and forbidden to invade the field of practice of any other school of drugless healing or of any regular school of healing. *Otherwise, the principles of law governing the*

relations of regular physicians and surgeons and their patients govern as to drugless healers and their patients.

Until the decision in the case brought by the respondent against petitioners on May 31, 1950 (R. 14), the Supreme Court of the State of Washington had not overruled or modified the holding in the case of *Brooks* v. *Herd, supra.*

November 1, 1945, the Supreme Court of the State of Washington, by its decision in the case of *Fritz* v. *Horsfall,* 24 Wn. (2d) 14, 163 P. (2d) 148, which was an action for malpractice, held: (omitting supporting citations)

> "Before referring to the facts, however, it seems advisable to set out certain general rules of law governing actions for malpractice which are almost universally accepted by the courts and which are applicable to the present situation. We set them out as follows:
>
> (1) An individual licensed to practice medicine is presumed to possess that degree of skill and learning which is possessed by the average member of the profession in the community in which he practices, and that he has applied that skill and learning with ordinary and reasonable care to those who come to him for treatment.
>
> (2) The contract which the law implies from the employment of a physician or surgeon is that the doctor will treat his patient with that diligence and skill just mentioned. (citing a case)
>
> (3) He does not incur liability for his mistakes if he has used methods recognized and approved by those reasonably skilled in his profession. (citing cases)
>
> (4) Before a physician or surgeon can be held liable for malpractice, he must have done something in the treatment of his patient which the recognized standard of medical practice in his community forbids in such cases, or he must have neglected to do something required by those standards. (citing cases)

(5) In order to sustain a judgment against a physician or surgeon, the standard of medical practice in the community must be shown, and, further, that the doctor failed to follow the methods prescribed by that standard.

(6) It is not required that physicians or surgeons guarantee results, nor that the result is what is desired. (citing cases)

(7) The testimony of other physicians that they would have followed a different course of treatment than that followed by the defendant, or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish negligence. *In such cases, the court must hold that there is nothing on which the jury may pass, the reason being that the jury may not be allowed to accept one theory to the exclusion of the other.* (citing cases)

(8) Negligence on the part of the physician or surgeon by reason of his departure from the popular standard of practice must be established by medical testimony. (citing cases)

The reason is that juries must be informed as to the facts or criterion upon and by which the standard of ordinary skill and ordinary care and diligence rests and is regulated by the medical profession. To supply the need, evidence may properly be introduced to show such facts. This evidence, from the very nature of the case, must come from men learned in the profession because other witnesses are not competent to give it. *Jurors* and *courts* are not in any way conversant with what is entirely peculiar to the practice of medicine and surgery. They may not arbitrarily determine the proper methods of treating an ailment, that is a medical question."

On the trial of the action the plaintiff (respondent here) offered the testimony of Dr. Oscar O. Christenson, a pathologist, who performed an autopsy on the deceased, Morris C. Kelly, and made a report and testified as to his findings.

The plaintiff also offered testimony of Drs. H. J. Copsey and Dr. Carl F. Schlicht, both medical physicians, and Dr. Schlicht, a surgeon who performed a minor operation on the deceased on July 21, 1948, and who treated the deceased from that time to July 28, 1948, when he died. Neither of these two doctors was permitted to testify as to anything with reference to their findings of the physical condition of the deceased and their treatment of him, nor were they permitted to pass judgment on whether or not the diagnosis and treatment by the petitioner Dr. O. G. Carroll was proper or improper.

The defendant produced as witnesses Dr. H. Riley Spitler, who qualified as an expert in the practice of drugless healing and naturopathy, a branch of drugless healing, Dr. John B. Bastyr, who qualified as an expert in the practice of drugless healing, naturopathy and as a pathologist, and Dr. W. A. Budden, who qualified as an expert in the practice of drugless healing, naturopathy and pathology, all of whom gave as their expert opinion that the diagnosis and treatment of the deceased Morris C. Kelly by the petitioner Dr. O. G. Carroll was proper and was not negligent and did not cause the death of the said Morris C. Kelly.

As opposed to the testimony of the defendants' witnesses above referred to the plaintiff offered the testimony of Dr. Carl G. Stevens, who qualified as a sanipractic physician, which is considered in the category of a drugless physician, who testified that if he diagnosed Morris C. Kelly's ailment as appendicitis, he would not attempt to treat him but would refer him to a surgeon for surgery, but did not state that Morris C. Kelly was afflicted with appendicitis. The trial court submitted the case to the jury under the rules of law laid down by the case of *Fritz* v. *Horsfall, supra,* which was the law of the state up to and until the time of the rendering and entering of the opinion and decision in the case of respondent *vs.* petitioners herein.

It is the position of the petitioners that by the opinion and decision (R. 14) the Supreme Court of Washington has overruled and abrogated rules of law established and followed in the trial of this case, and without giving the petitioners an opportunity to present their defense under the rules established by the opinion and decision, the petitioners have been or will be deprived of their constitutional rights above referred to.

Reasons for Granting the Writ

The petitioners contend that by reason of the opinion and decision of the Supreme Court of the State of Washington entered May 31, 1950 (R. 14), they have been discriminated against and have been denied equal protection of the law and have been or will be deprived of their property and their right of liberty to pursue their profession contrary to the provisions of Amendment XIV of the Constitution of the United States.

On the issues raised by the pleadings the case was tried in the trial court strictly in accordance with the rules governing malpractice cases as formulated in the cases of *Brooks* v. *Herd*, 144 Wash. 173, 257 Pac. 238, and *Fritz* v. *Horsfall*, 24 Wn (2d) 14, 163 P. (2d) 148, particularly in that petitioners limited their expert testimony to practitioners of their own system of drugless healing.

By its opinion and decision the Supreme Court of the State of Washington judicially legislated that drugless physicians practicing and using the same methods used by petitioner Dr. O. G. Carroll could not qualify as expert witnesses and were not entitled to give an expert opinion as to whether or not Dr. Carroll's treatment was proper or improper, and further, without support in the record that the deceased Morris C. Kelly, during the time he was under the care and treatment of Dr. Carroll was afflicted with appendicitis, that there is no other recognized method of

treating a condition known as appendicitis than by a surgical operation.

For all of these reasons the petitioners pray that if the rules and principles governing the relation of physician and surgeon are different from the relation of drugless healers and their patients, that they be given an opportunity to defend the claims of the respondent on the basis of the rules promulgated in the opinion and decision rendered by the Supreme Court of Washington, May 31, 1950 (R. 14).

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CLARENCE C. DILL,
Counsel for Petitioner.

(Date:) Oct. 7, 1950.

APPENDIX "A"

Rule 22 of the Rules of the Supreme Court of the State of Washington, in effect March 2nd, 1944, and still in effect, reads as follows:

"RULE 22—REHEARINGS

(1) Every petition for rehearing shall be filed within thirty days after the opinion in the cause has been filed. No more than one petition shall be filed by the same party. The filing of a petition for rehearing shall suspend the decision of the court until the cause is finally determined.

(2) Twenty-five printed copies of the petition shall be filed with the clerk.

(3) When a rehearing is granted, the clerk shall notify counsel for the respective parties thereof.

(4) When an answer to a petition for rehearing is called for by the court, the clerk shall mail to the attorney of the party from whom the answer is required a copy of the original petition, with a request that he file an answer thereto within fifteen days.

(5) Petitions for rehearings shall be printed and of the dimensions and style required by Rule 16 in the case of briefs."